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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 371

HOWARD FOUNDRY COMPANY,
Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUTENBERG PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Howard Foundry Company, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on May 27, 1953, without opinion and has not been reported, but is printed in the record filed herewith on page 481.

The opinion of the United States Court of Appeals for the Seventh Circuit reversing said judgment was filed May 16, 1955, and is reported at 222 F. 2d 767 and is set forth in the appendix hereto *infra*, page 23, and in the certified copy of the record.

JURISDICTION.

On June 9, 1955, the United States Court of Appeals for the Seventh Circuit entered its order denying a petition for rehearing in this cause. This petition is filed within ninety (90) days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1).

STATUTES AND RULES INVOLVED.

28 U. S. C. A. 1254(1).

Federal Rules of Civil Procedure, Rule 2.

Federal Rules of Civil Procedure, Rule 8.

Federal Rules of Civil Procedure, Rule 38.

Federal Rules of Civil Procedure, Rule 39.

Federal Rules of Civil Procedure, Rule 54.

Pertinent sections are set forth in Appendix, *infra*, pages 28-32.

QUESTIONS PRESENTED.

1. Under the rules of civil procedure for the United States District Court, is not a party entitled to relief which is warranted by the facts disclosed on the hearing of a case, regardless of the theory under which that party proceeded, and whether or not such relief is provided at law or in equity, or both? Even prior to such rules, could

not a reformation be granted in conjunction with legal relief in the same action?

2. Did the Court of Appeals err in holding that a mistake by the agent of the insurer in describing the property insured had no bearing on the insured's right of recovery, where the established law of the State of Illinois provides that such a mistake estops the insurer from setting up the defense that the description in the policy does not include the property destroyed?

3. When a fire insurance binder is issued by an insurance company, which admittedly describes the location of the real property accurately, and which has not been revoked, can the insurance company alter the legal description in the printed policy later issued and so be released from liability on destroyed property described in the original binder?

4. Where a jury has rendered a verdict based on proper instructions and where such verdict could have been rendered as a result of such instructions on any one of various alternative theories, is it not error on the part of an appeals court to reverse the jury's verdict on the assumption that their finding was based on only one of such theories, completely ignoring the others?

5. Is not the opinion by the Court of Appeals in this case a departure from the usual course of judicial proceedings in that it interprets the insurance company's policy in favor of the insurer contrary to a jury's finding, so as directly to affect, through establishing such a precedent, the rights of innumerable insureds, who now labor under the false apprehension that their security is protected through insurance policies which they have depended upon the insurers to prepare accurately?

STATEMENT OF THE CASE.

In November of 1943, one Frank C. Howard acquired a one-half interest in a farm in McHenry County, Illinois, from one Edward E. Fleury. At the time Mr. Howard purchased the one-half interest in said farm in McHenry County, Illinois, which was commonly referred to as the Schaefer or Bohr Farm, he was acting in his capacity as President of the Howard Foundry Company, to purchase farms in McHenry County, Illinois, for an operation conducted by the Howard Foundry Company, which later became known as the Hickory Creek Farm. (R. 129, 216.) The name "Schaefer farm" had been used to describe the property for a good many years; however, it also had the name of "Bohr farm" for the reason that the said Edward E. Fleury had purchased the farm in October, 1943, from Magdalena Bohr, who held a purchase money mortgage on the farm for some time thereafter, until it was ultimately paid off in 1945. (Def. Hartford's Ex. 3.)

On November 10, 1943, Frank C. Howard and Edward E. Fleury purchased a policy of fire insurance covering the Schaefer farm from the Travelers Fire Insurance Company of Hartford, Connecticut, for a period of five years, expiring on November 10, 1948, for a total premium of $449.37. (R. 217, Pltf.'s Ex. 1.) The total amount of $12,590 included the amount of $5,600 on a frame barn on the premises. The farm was described to be in McHenry County, Illinois, situated in Sections 15 and 22, Township 45, Range 8, near McHenry, with a loss payable clause to be adjusted with the insured named in said policy and payable to the insured and Mrs. Magdalena Bohr as their respective interests may appear.

Between November 10, 1943 and September 10, 1945, the title to the farm was transferred by Frank C. Howard and Edward E. Fleury to the Howard Foundry Company

after the interest of Edward E. Fleury was purchased by it. (R. 129, 130, 216.) During the year 1945, the Howard Foundry Company was making extensive alterations and remodeling and repairs of the said barn, which was reconstructed at a cost of approximately $35,000. (R. 131.) In September, 1945, the Howard Foundry Company had had a policy on the buildings on said Schaefer farm issued by the Fidelity-Phenix Fire Insurance Company (R. 135) which included, among other things, some $15,000 worth of insurance on the said barn. The Fidelity-Phenix Fire Insurance Company reinsured a portion of its risk with the Defendant Hartford Fire Insurance Company. (After the fire which later occurred, the Fidelity-Phenix Fire Insurance Company paid the Plaintiff Howard Foundry Company for the loss and the Hartford Fire Insurance Company paid its share of the loss under its contract of reinsurance.) (R. 228, 199.)

On December 10, 1945, said Frank C. Howard, President of the Howard Foundry Company, telephoned Mr. Arthur J. Feicht, who was an insurance floor agent and also an insurance broker of the Travelers Fire Insurance Company, and informed him of the extensive alterations and repairs on the Schaefer farm and requested that the coverage on the barn under the Travelers policy be raised to at least $15,000. (R. 132, 133, 75.) Said Feicht accepted the order for the increased insurance and informed Mr. Howard by letter that the insurance of the barn was increased to $15,000. At the same time, Feicht informed Travelers underwriting department that the old barn had been so reconstructed that it was a wholly new structure and requested an additional binder for $15,000 on Item 14 of Policy Number 53,969. (R. 74, 75, 77, 80.)

According to defendant Travelers' agent's evidence, it was the policy of the Travelers Insurance Company to

limit its coverage on any item of farm property on any building to not more than $5,000 (R. 225, 257), and, accordingly, the branch office of the Travelers Insurance Company requested permission from its home office to increase its coverage on the said premises. Travelers' evidence also was that the home office of the Travelers Insurance Company informed the Chicago office that it did not desire to increase the insurance and that, if increased insurance was desired, the risk should be refused and the policy cancelled. None of the inter-office communications within the Travelers' and Hartford organizations, which occurred after December 10, 1945, were ever communicated to the Plaintiff, Howard Foundry Company, which was ignorant of the request of Travelers to the home office to increase the insurance.

It is difficult for the Plaintiff to relate exactly what occurred from this point forward, *but the evidence introduced* was that on December 17, 1945, Mr. George Wagner, the chief underwriter for the Travelers Fire Insurance Company, telephoned H. B. Allen, farm underwriter of the Hartford Fire Insurance Company, and informed him that the Travelers had a piece of business and wanted to know if the Hartford would be interested in taking over, because the amount of insurance required was more than the amount Travelers wanted to carry on farm property. (R. 202.)

Thereupon, Hartford issued its "binder" the exact same date of cancellation of the Travelers Policy, in the names of the owners, Frank C. Howard and Edward Fleury, and identifying the farm by legal description, Sections 15 and 22, Township 45, Range 8, McHenry, Illinois, including among other things, $15,000 barn and loss clause, Mrs. Bohr, marked "bound 12-17-45." (Plaintiff's Exhibit 19, R. 203.)

On December 19, there was another telephone conversation between said Wagner, underwriter for the Travelers Insurance Company, and Allen, farm underwriter for the Hartford, increasing by $2,500 the insurance bound on the dwelling and a change of the name of the insured from Frank C. Howard and Edward E. Fleury to the Howard Foundry Co. (R. 207.)

Thereafter Mr. Wagner, underwriter at the Travelers, informed Mr. Feicht that Mr. Allen at the Hartford was taking over the entire risk and requested Mr. Feicht to obtain the Travelers policy of insurance for the said farm from the Howard Foundry Company as the risk was being taken over by the Hartford. Mr. Feicht, agent and broker, subsequently telephoned Howard Foundry Company to return its policy of insurance so that the increase could be accomplished. On March 29, 1946, the policy of Travelers Insurance Company was cancelled as of December 17, 1945 (R. 89, 258; Plaintiff's Exhibit 1) and on March 6, 1946, the policy of insurance of the Hartford Fire Insurance Company No. 205910 was issued, insuring Howard Foundry Company in the amount of $21,350, for a total premium of $737.52. This policy was back dated to December 17, 1945 and was for a term of 5 years from that date, covering, among other things, a sum of $10,000 insurance on the barn and $750 on the silo. (R. 209-210.)

There was much testimony in the record, over plaintiff's objections, having to do with the private files of the Hartford Fire Insurance Company and conversations between its inspector, Glen L. Russell, and officials of the Hartford Fire Insurance Company, as well as some claimed conversations with said Arthur Feicht to indicate that the Hartford Fire Insurance Company issued a policy of insurance on the Justen Farm, which happened to be a farm

also owned by the Howard Foundry Company situated adjacent to said Schaefer farm and also located in Sections 15 and 22, Township 45, Range 8, McHenry County, Illinois. The policy of insurance issued by the Hartford Fire Insurance Company described a farm owned by the insured and occupied by a tenant, and "situated on and confined to 166 acres in the ..... of Section 15, Township 45, range 8, McHenry County, Illinois." (Pltf.'s Ex. 6.)

During January, February and March, 1946, the Howard Foundry Company converted the barn on the Schaefer farm from a horse barn to a cow barn, with some appreciation in the value of the building. (R. 130-131, P. 246.)

During the month of August, 1947, the barn on the Schaefer farm was destroyed by fire and two silos connected with said barn were also totally destroyed by the fire. (R. 90, 135-136, 227.) At the time of the fire, the barn which burned had a replacement value in excess of $50,000. (R. 135.)

Due notice of loss and demand for payment was made on the Hartford Fire Insurance Company. Upon Hartford's refusal to pay for such loss, Howard filed a proceeding to enforce such claim in a state court of competent jurisdiction.

The case was removed to the United States District Court for the Northern District of Illinois, Eastern Division and thereafter the plaintiff twice amended its complaint.

Plaintiff's second amended complaint on which the case was tried, contained three counts.

Count I was drafted on the theory that the Hartford Fire Insurance Company had issued a contract of insurance to the Plaintiff on the Schaefer farm and Plaintiff was entitled to collection on its contract of fire insurance with Hartford; Count II was drafted on the theory that, if the policy of insurance issued by the Hartford Fire Insurance

Company did not cover the barn on the Schaefer farm but covered the Justen farm as claimed by Hartford, then the fact that the policy of insurance did not cover the Schaefer farm was due to the negligence of the Defendant Hartford Fire Insurance Company or the Defendant Travelers Fire Insurance Company, or both; and Count III of the Complaint was drafted on the binder of insurance issued by the Hartford Fire Insurance Company on the Schaefer farm, and that its binder was never cancelled or terminated and on the date of the fire was still in full force and effect.

After the completion of that trial, the jury rendered a verdict in favor of Travelers Fire Insurance Company and a verdict against the defendant, Hartford Fire Insurance Company, in the amount of $10,750.00 with interest from February 1st, 1948. (R. 4, 480.) Defendant, Hartford Fire Insurance Company moved for a directed verdict at the close of the plaintiff's case and at the close of all the evidence. Both motions were denied by the trial court. Judgments were entered on the verdict, and the motions of the Hartford Fire Insurance Company for judgment notwithstanding the verdict and in the alternative for a new trial were overruled by the trial court. (R. 488.) The defendant, Hartford Fire Insurance Company, appealed from the judgment, and the plaintiff, Howard Foundry Company, appealed from the judgment in favor of the Travelers Fire Insurance Company and cross-appealed from the judgment in favor of the Hartford Fire Insurance Company on the question of attorneys' fees. The basis of Hartford's appeal was the denial by the trial court of its motion for judgment notwithstanding the verdict. Briefs were filed by all parties and oral argument was heard by the Court of Appeals which affirmed the verdict as to Travelers and reversed the judgment in favor of the plaintiff and against the Hartford Fire Insurance Company. The petition for rehearing was denied, resulting in the filing of this petition.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE STATE LAW.

(a) Under Illinois Law a Unilateral or Mutual Mistake in Preparation of an Insurance Policy Is a Controlling Factor.

The Court of Appeals was obligated, as agreed by both parties and the court in its opinion, to follow the law of Illinois in deciding whether or not the insured could recover on a policy which contained an erroneous description.

The court completely ignored Illinois law when it held:

> "On the state of this record we think it unnecessary to narrate evidence presented below purporting to demonstrate intention of the contracting parties, or of a unilateral or mutual mistake." (App. 25.)

The trial court had properly followed the law of the State of Illinois and instructed the jury that if the defendant were guilty of fraud or mistake in the preparation of the policy, so that the proper description was not inserted, the issues should be found for the plaintiff. The jury entered a verdict for the plaintiff. Illinois law has historically followed that rule and even the case cited the Appellate Court of Appeals in its decision, *Pollock* v. *Connecticut Fire Insurance Company of Hartford*, 281 Ill. App. 305, affirmed 362 Ill. 313, so holds. The weight of authority on this issue is further set forth in *Royal Neighbors of America* v. *Boman*, 177 Ill. 27; *Buchanan* v. *Scottish Union and National Insurance Co.*, 210 Ill. App. 523; *Mooney* v. *Commercial Casualty and Insurance Company*, 350 Ill. App. 328; *Anderson* v. *Pettigrew Foundry Company*, 297 Ill. App. 14.

(b) Under Illinois Law the Mere Possession, or Reading, of Such Policy by the Insured Does Not Bar Recovery.

The Court of Appeals based its reversal upon the fact that the insured received the policy and had access to it. Such a ruling is contrary to the law of the State of Illinois as set forth in *Pollock* v. *Connecticut Fire Insurance Company of Hartford,* 281 Ill. App. 305, affirmed 362 Ill. 313, where it is stated:

> "*Unless he has been misled by some act of the insurer,* it is generally held that a person who accepts and retains possession of an insurance policy is bound to know its contents." (Emphasis supplied.)

See also:

Royal Neighbors of America v. *Boman,* 177 Ill. 27; *Johnson* v. *Royal Neighbors of America,* 253 Ill. 570. In *Buchanan* v. *Scottish Union & National Insurance Co.,* 210 Ill. App. 523, the court states:

> "the principle applied in these cases is not new in this state but has been uniformly announced and adhered to in a long line of cases."

Yet the Court of Appeals nevertheless ruled as a matter of law that because the comptroller of the insured corporation possessed and looked at a policy the insured was bound by an error in description. Is not such a question of contributory negligence one for the trial court to determine?

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS WITHIN ITS OWN CIRCUIT AND WITH DECISIONS OF COURTS OF APPEALS FOR OTHER CIRCUITS, AND WITH THE LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT.

(a) Relief Will Be Granted Upon the Facts Proven Whether It Be in Law or Equity Regardless of the Theory Proceeded on or the Prayer for Relief.

The Court of Appeals erred when it based its decision on this premise:

> "But plaintiff proceeded on the theory that the policy of insurance, on which it grounds this claim against Hartford, is sufficiently supple to cover the loss by fire of buildings located within Section 22." (App. 25.)

Under the Rules of Federal Civil Procedure it has become the established law that a plaintiff is to be granted any relief to which the facts show he is entitled. (Federal Rules of Civil Procedure 54 (c).) This rule applies whether such relief has been prayed for, whether it be legal or equitable, and regardless of the theory alleged or proceeded on.

Hutches v. *Renfro* (C. A. 5th, 1952), 200 F. 2d 337; *Gulbenkian* v. *Gulbenkian* (C. C. A. 2d, 1945), 147 F. 2d 173; *Truth Seeker Co., Inc.* v. *Durning* (C. C. A. 2d, 1945), 147 F. 2d 54; *Ring* v. *Spina* (C. C. A. 2d, 1945), 148 F. 2d 647; *Mercury Oil Refining Co.* v. *Oil Workers International Union, CIO* (C. A. 10th, 1947), 187 F. 2d 980; *Garland* v. *Garland* (C. C. A. 10th, 1947), 165 F. 2d 131.

The quoted ruling is directly contrary to the ruling of the same court in *Reconstruction Finance Corporation* v. *Goldberg* (C. C. A. 7th, 1944), 143 F. 2d 752.

Again, this same court has stated, in *Kansas City, St. Louis, and Chicago R. R. Co.* v. *Alton R. R. Co.* (C. C. A. 7th, 1941), 124 F. 2d 780, in an opinion by Mr. Justice Minton:

> "We do not think the prayer on this part of the complaint is for equitable relief. Even if it were, the prayer does not control. The prayer may be looked to to help determine the relief to which the appellant is entitled, but it is not controlling.
>
> " 'The question is not whether the plaintiff has asked for the proper remedy but whether under his pleadings he is entitled to any remedy.' " *Catanzaritti* v. *Bianco*, D. C. 25 F. Supp. 457.
>
> "If the appellant has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded." (Citing cases.)

The second holding by the court which directly conflicts with the rule cited and also rules 2, 38 and 39 of the Federal Rules of Civil Procedure is:

> "• • • it was beyond the province of the jury in this action at law, to reform or, indeed, apply that policy to the fire loss sustained by plaintiff." (App. 26.)

Under present rules the distinction between proceedings at law and in equity have been abolished and cases bearing elements of both can be determined in one action, regardless of the theory pleaded or relief asked for. *Williamson* v. *Columbia Gas and Electric Corporation* (C. C. A. 3d, 1939), 110 F. 2d 15; *Commercial Natl. Bank in Shreveport* v. *Parsons* (C. C. A. 5th, 1944), 144 F. 2d 231; *Bereslavsky* v. *Caffey* (C. C. A. 2d, 1947), 161 F. 2d 499; *Bereslavsky* v. *Kloeb* (C. C. A. 6th, 1947), 162 F. 2d 862; *Jordine* v. *Walling* (C. A. 3d, 1950), 185 F. 2d 662.

The Court of Appeals in this Seventh Circuit has pre-

viously recognized this to be the rule and has so held in *Kansas City, St. Louis and Chicago R. R. Co.* v. *Alton R. R. Co.* (C. C. A. 7th, 1941), 124 F. 2d 780; *Maltz* v. *Sax* (C. C. A. 7th, 1943), 134 F. 2d 2, cert. denied (1943) 219 U. S. 772, 63 S. Ct. 1437, 87 L. Ed. 1720; *Weeks* v. *Bareco Oil* (C. C. A. 7th, 1941), 125 F. 2d 84.

Under the above holdings as well as under decisions construing Rule 8(a) of the Federal Rules of Civil Procedure, which simplifies the method of stating a claim, the decision below is in error.

In all of the following cases reformation and other appropriate relief was granted, although not pleaded or prayed for in an action at law: *Metropolitan Casualty Insurance Co. of New York* v. *Friedley* (N. D. Iowa, 1948), 79 F. Supp. 978; *Herzbergs Inc.* v. *Ohio Accident and Guarantee Corp.* (D. Neb., 1941), 42 F. Supp. 52; *Broidy* v. *State Mutual Life Assurance Co. of Worcester* (C. A. 2d, 1951) 186 F. 2d 490.

Even without considering present rules of Federal Civil Procedure, the case of *Schongalla* v. *Hickey,* (C. C. A. 2nd, 1945) 149 F. 2d 687, cert. denied, 326 U. S. 736, 66 S. Ct. 46, 9 L. Ed. 439, established the rule that reformation would be deemed granted and the proper relief awarded in an action at law.

> "In a suit upon the contract of insurance, where such procedural right to reform the policy exists, the courts often give the same relief as though a decree of reformation had actually been obtained."

That case cited *Aetna Ins. Co.* v. *Brannon,* 99 Tex. 391, 89 S. W. 1057, as its authority, wherein an excellent discussion of the procedure is explained.

Illinois, and the majority of states, have long followed the same rule. *German Insurance Co.* v. *Miller,* 39 Ill. App. 633; *Lumbermens Mutual Insurance Co.* v. *Bell,* 166

Ill. 400; *Buchannan* v. *Scottish Union and National Insurance Co.*, 210 Ill. App. 523. An exhaustive analysis covering the law of other jurisdictions is contained in *66 A. L. R. 767.*

(b) Binder Contract Controlled in Absence of Agreed Variation in Subsequent Policy and Could Not Merge in Policy With Different Description.

It is admitted by all parties that a binder contract was granted properly describing the now destroyed property. Hartford's theory was that such a binder merged with the policy issued even though different properties were described. Nowhere is it contended that the binder was cancelled.

It is impossible for a binder of insurance on one building to merge into a policy of insurance on a completely different building. This court held in *Equitable Safety Insurance Company* v. *Hearn*, 20 Wall. 494, 87 U. S. 494, 22 L. Ed. 398, that

> "It is not denied that the correspondence constituted a preliminary agreement. Such clearly was its effect. The policy was intended to put the contract in more full and formal shape.
>
> "* * * he had a right to assume that the policy would accurately conform to the agreement thus made, and rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They intended to prevent such scrutiny, and if it was necessary, threw him off his guard."

and in the same case:

> "In this controversy the clear terms of the preliminary agreement warranted the court below in overruling the departure from it, found in the policy."

Also, in the case of *Republic Insurance Company, Dallas, Texas* v. *French,* (C. A. 10th, 1950) 180 F. 2d 796:

> "* * * the company cannot avoid liability by issuing a policy which does not cover the risk contemplated by the binder. * * * it cannot promise one contract and fulfill it with another. *Mut. Fire Ins. Co.* v. *Goldstein,* 119 2d 83, 86 a. 35, Ann. Cas., 1914 C, 723, Couch on Insurance, Vol. 1, Sec. 81."

How then can the Circuit Court, in reversing the trial court, be justified in saying,

> "We have fully considered all plaintiff's contentions, including those bottomed on the binder". (App. 26.)

If the binder was on the destroyed property, the description therein contained must control. Any ruling to the contrary conflicts with the cited decision of this court and that of the Tenth Circuit.

(c) Under the Evidence Heard and the Instructions Given, the Jury's Verdict Should Have Been Accepted as Controlling.

The appellate court overruled the jury's determination for the stated reason that it was beyond the jury's province, in the absence of an ambiguity, to reform the policy or to apply it to Howard's loss in an action at law. This ruling followed the assumption that the jury by their verdict

> "* * * fitted the loss of the buildings situated in Section 22 into this policy which mentions structures in Section 15." (App. 25.)

The right to trial by jury has been retained and reemphasized in Rule 38 of the Federal Rules of Civil Procedure. Such a concept is basic and needs no citation of authority.

Since the passage of the Federal Rules of Civil Procedure, joining legal and equitable causes of action, question has arisen as to the propriety of a jury deciding issues where mixed causes exist. The Courts of Appeals in all Circuits have resolved this problem by ruling that the basic nature of the proceeding controls. *Prudential Insurance Co.* v. *Saxe* (App. D. C., 1943), 134 F. 2d 16; *Barnett* v. *New England Mutual Life Ins. Co.* (C. C. A. 5th, 1941), 123 F. 2d 712; *Hargrove* v. *American Central Insurance Co.* (C. C. A. 10th, 1942), 125 F. 2d 225.

It is submitted here that the basic issues were legal and that reformation, if necessary, was only an incidental element under the oft-held theory that, "equity considers done that which ought to be done."

Even if the appellate court considered it an equitable action, no objection was raised to the jury's determining the issues. Under Rule 39, of the Federal Rules of Civil Procedure, the court could have called a jury for an advisory opinion.

In a case similar to this the jury's verdict was so considered and therefore no error resulted. *Hargrove* v. *American Central Insurance Co.* (C. C. A. 10th, 1942), 125 F. 2d 225. To deny such right has been held to be error. *Leimer* v. *Woods* (C. A. 8th, 1952), 196 F. 2d 828.

It is important to note that this precise question, the right of jury trial, was appealed in a similar case, but was never determined by this court for lack of a final judgment subject to review. *City of Morgantown, W. Va.* v. *Royal Insurance Company Ltd.* (1949), 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347. This case therefore presents an opportunity for this Court to determine that issue for the benefit of future litigants.

Did the jury fit a loss in Section 15 into a policy on a building in Section 22? Or did they find

(a) That the error was caused by Hartford, estopping it from raising the defense of faulty description,

or

(b) That the true contract was the binder?

or

(c) That the policy was reformed due to a unilateral or mutual mistake?

All of the above possibilities exist and any would be legitimate basis for the jury's finding as it did. When such alternatives exist, the Court of Appeals is bound to draw all reasonable inference in favor of the jury's finding. *Worcester* v. *Pure Torpedo Co.* (C. C. A. 7th, 1944), 140 F. 2d 358; *Central State Cooperatives, Inc.* v. *Watson Bros. Transp. Co.* (C. A. 7th, 1950), 180 F. 2d 689, cert. denied 340 U. S. 815, 71 S. Ct. 44, 95 L. Ed. 599. With the various alternative possibilities presented and with the wealth of evidence presented on all such issues, it was the appellate court's duty to accept the verdict if at all possible and to affirm the judgment entered, if under any theory the plaintiff was entitled thereto. Has it not substituted its conclusions for those of the jury and the trial court?

III.

DECISION OF THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL JUDICIAL PROCEDURE THAT AN EXAMINATION OF ITS DECISION IS REQUIRED.

(a) The Policy of Insurance Should Be Construed Most Favorably to the Insured and If at All Possible Indemnity Granted.

The rule that an insured should be protected if at all possible has been universally upheld. This rule has been derived through a multitude of decisions recognizing the insurance business to be "clothed with public interest" above and beyond the problem existing in any particular case. (*German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011.) All policies of insurance are prepared by the company insuring them and are normally completed by such company's agents or representatives. Unlike most contracts, the signature of the insured is not required, yet he is considered to have agreed to the policy he retains. The layman is dependent upon the agent or representative of the company he deals with to prepare a policy to protect him from the risk which it is purportedly covering. Therefore, responsibility for an error by the company, or its agent, which would otherwise nullify the contract involved has, throughout the history of this Court, been placed upon the insurer, even where the insured has the policy in his possession. This Court has held that a different ruling would give the insurance company an unconscionable advantage and that the insured should be free to rest in the belief that the policy will be prepared in conformance with his contract. *Snell* v. *Atlantic Fire and Marine Insurance Company of Providence, R. I.* (1878), 98 U. S. 85, 25 L. Ed. 52.

The authorities in all states and the decision of the various Courts of Appeals are universal in so holding.

The decision in this case has completely transgressed that basic concept and has established a precedent which, if left to stand unclarified, will not only deprive this insured of its just dues but will create a situation where many people will be resting in the false belief that they have frugally protected themselves against an unforeseen catastrophe. This decision will in effect force every layman to become as educated in the law of insurance as the ruling courts, but without the advantage of supporting briefs.

It is imperative that we not revert to the law of *caveat emptor* in insurance dealings and that this court review the decision below so that such a result does not follow.

The decision in this case requires clarification. The basic reasoning and the rules of law upon which the decision is based are jumbled and unintelligible. If the decision hinges upon whether court or jury should decide the issues, then it is time for this court clearly to establish what rights exist under the present Federal Rules of Civil Procedure. If the decision rests upon another basis, the conflict with existing law and the major importance of the business of insurance requires a more full and complete decision for the edification of the many who will undoubtedly be affected.

CONCLUSION.

It is imperative that a decision, so intimately affecting the insurance business and its relationship to every holder of *any* insurance policy, be reviewed, where the decision has summarily dismissed both the jury's finding and the rules of law with reference to binders, agents' mistakes, and theory of proceedings, and has ruled in effect that,

regardless of all things, a description written in an insurance policy controls. It is submitted that such a decision would, if allowed to stand unchallenged, destroy the many safeguards established to protect both insured and insurers and would relegate the practice in Federal Courts to the days of common law pleading.

Respectfully submitted,

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APPENDIX.

OPINION AND ORDER OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND STATUTES AND RULES INVOLVED.

1. Opinion.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11075, 11076.

October Term, 1954, January Session, 1955.

HOWARD FOUNDRY COMPANY, *Plaintiff-Appellee-Appellant,* *vs.* HARTFORD FIRE INSURANCE COMPANY, ET AL., *Defendants-Appellants-Appellees.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

May 16, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Howard Foundry Company, plaintiff, sustained a loss by fire on its Schaefer farm in August, 1947. Howard sued the Hartford Fire Insurance Company, January 23, 1948, on a policy of fire insurance numbered 205910 in the Superior Court of Cook County, Illinois, and the case was removed to the district court below. The Travelers Fire Insurance Company was joined as a co-defendant on the theory that if no coverage was provided by that Hartford policy, then Travelers was negligent in failing to procure a fire policy from Hartford for the plaintiff. A jury awarded $10,750.00 damages to Howard in its action against Hartford. That judgment

is brought here on review as case number 11075 by Hartford seeking reversal because the district court denied its several motions for: (i) a directed verdict, made at the usual junctures during a trial on the merits, (ii) judgment notwithstanding the verdict and, (iii) a new trial. In this same appeal, plaintiff is a cross-appellant challenging the district judge's refusal to allow it, Howard, recovery of attorney fees from Hartford. Case number 11076 is Howard's appeal from an adverse verdict rendered by the same jury in favor of the co-defendant Travelers Fire Insurance Company. We continued Travelers' motion to dismiss appeal number 11076; taking it with the case for disposition. It is treated in this opinion.

Hartford's appeal in 11075 pivots on its fire insurance policy number 20910 covering plaintiff's property ". . . situated on and confined to 166 acres in . . . Section *15* Township 45 Range 8 County of McHenry State of Illinois." Scheduled in this policy, for specific sums, are these buildings protected for the assured-plaintiff: "2½ story app. roof frame Dwelling House . . . Private Garage and Tool House . . . Chicken House . . . App. roof frame Barn and Sheds . . . solid cement Silo . . ." (italics supplied) It is undisputed that plaintiff suffered a loss by fire which destroyed a barn and two silos, in Section *22*, Twp. 45 N. Range 8, E. 3rd P. M., situated on its *Schaefer* (also known as Bohr) farm. But, plaintiff also owned several other farms, including one known as the *Justen* farm, the buildings of which were located in Section 15, Twp. 48, N. R. 8 East of the 3rd P. M. Acreage of the Bohr and Justen farms ran over into both sections 15 and 22. Plaintiff grounds its claim of recovery from Hartford on the aforesaid policy asserting that this contract of insurance sufficiently identified the *Schaefer-Bohr* farm, so that buildings situated on it were covered when the loss occurred. Hartford resists this claim because, it contends, the policy described plaintiff's buildings located on its Justen farm and there was, in fact, no fire at that place. Obviously, no question exists as to the physical site of the destroyed buildings. The core question is whether plaintiff was insured against the loss of structures in Section *22* though Hartford's policy 20910 describes acreage and buildings as located in Section *15*.

Both litigants agree Illinois law is determinative here and cite us to decisions of varying vintage reported by

the Appellate Court of Illinois; an intermediate tribunal. Yet we are constrained to follow an earlier benchmark set in *Ballard* v. *Citizen Cas. Co.*, 196 F. 2d 96, 100 (7th Cir. 1952) by adhering to the guide announced in *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 237 (1940):

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Of course we are unable to predict whether the Illinois Supreme Court would, or will, depart from, or adhere to, the holding reported by the Appellate Court as *Niedringhaus* v. *Aetna Life Insurance Co.*, 235 Ill. App. 335 (1925). Yet Hartford relies heavily upon that decision and plaintiff responds by enthusiastically extracting a rule from the identical opinion, urging that proposition as virtually determinative of Howard's position here. But plaintiff proceeded on the theory that the policy of insurance, on which it grounds this claim against Hartford, is sufficiently supple to cover the loss by fire of buildings located within Section 22. Consequently, at the trial below, plaintiff introduced evidence of events in competition with the written description, Section 15. By their verdict, the jury fitted the loss of buildings situated in Section 22 into this policy which mentions structures in Section 15. Hartford refrains from voiding policy No. 205190, and simply denies liability under that contract of insurance because there was in fact no fire, or loss occasioned thereby, to buildings in Section 15. Testimony of plaintiff's comptroller, since 1936, establishes that he received policy 205190 sometime in March 1946 and he read it over; it also appears from evidence given by this witness that he had access to the policy. *Pollock* v. *Connecticut Fire Insurance Company*, 281 Ill. App. 305 (1935) affirmed 362 Ill. 313, 322, 199 N. E. 816 (1936), *Lumber Underwriters of N. Y.* v. *Rife*, 237 U. S. 605 (1915).

Plaintiff would have us ignore the clear recital of acreage and section number in the policy. On the state of this record we think it unnecessary to narrate evidence presented below purporting to demonstrate intention of the contracting parties, or of a unilateral or mutual mistake.

We hold that judgment should have been entered in favor of Hartford Fire Insurance Company *non obstante veredicto* [*Pringle* v. *Gulf, Mobile & Ohio R. R.* 212 F. 2d 632 (7th Cir., 1954)] under the motion filed by that defendant at the trial level. In the absence of an ambiguity in policy 205190 it was beyond the province of the jury in this action at law, to reform or, indeed, apply that policy to the fire loss sustained by plaintiff. In reaching this disposition we fully considered all plaintiff's contentions, including those bottomed on the binder, its argument concerning general principles involved when interpreting policies of insurance, and the inapposite case, *German Insurance Co.* v. *Miller,* 39 Ill. App. 633 (1890).

Allowance or disallowance of attorney fees under Ill. Rev. Stat. 1953, § 155 of the Illinois Insurance Code, Ill. Rev. Stat. 1953, chap. 73, par. 767 is a matter vested in a trial judge. Nor would we disturb the district judge's exercise of judgment and discretion on the face of this record, and therefore affirm the denial of plaintiff's motion for attorney fees.

In appeal number 11076, plaintiff, as cross-appellant, urges that the final judgment entered on the jury's verdict finding the issues for Travelers is vulnerable owing to a particular instruction given, and one that was refused. After examining the Supplement to Volume II, stenographic transcript of proceedings, we are satisfied that plaintiff failed to properly comply with Rule 51, Fed. R. Civ. Proc., 28 U. S. C. A., thereby disqualifying its assignment of errors concerning jury instructions.

We do not reach the motion (already mentioned) to dismiss the appeal taken by plaintiff in case 11076, because after examining the underlying record found free of reversible error it is our opinion that the jury's verdict should be left undisturbed.

Judgment entered below for plaintiff Howard Foundry Company against Hartford Fire Insurance Company, appeal number 11075 is reversed and the order denying plaintiff's motion for allowance of attorney's fees is affirmed.

The final judgment in case number 11076 in favor of The Travelers Fire Insurance Company against Howard Foundry Company is

AFFIRMED.

DUFFY, *Chief Judge.* I concur in the result.

2. Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, June 9, 1955.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

HOWARD FOUNDRY COMPANY, a corporation,
Plaintiff-Appellee,
No. 11075 *vs.*
HARTFORD FIRE INSURANCE COMPANY,
Defendant-Appellant;

HOWARD FOUNDRY COMPANY,
Plaintiff-Appellant,
No. 11076 *vs.*
HARTFORD FIRE INSURANCE COMPANY and THE TRAVELERS FIRE INSURANCE COMPANY,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby,

DENIED.

3. Statutes and Rules Involved.

Title 28 U. S. C. A. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

Federal Rules of Civil Procedure, Rule 2: *One Form of Action.*

> There shall be one form of action to be known as "civil action".

Federal Rules of Civil Procedure, Rule 8: *General Rules of Pleading.*

> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.
>
> (b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good

faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risks, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to Be Concise and Direct; Consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independ-

ently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

Federal Rules of Civil Procedure, Rule 38: *Jury Trial of Right.*

(a) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) *Same: Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Federal Rules of Civil Procedure, Rule 39: *Trial by Jury or by the Court.*

(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Federal Rules of Civil Procedure, Rule 54: *Judgments; Costs.*

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) *Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

3721

FILED

OCT 3 1955

In the

Supreme Court of the United States

October Term, A. D. 1955.

No. 371

HOWARD FOUNDRY COMPANY,

Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 222 Fed. 2(d) 767.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 16, 1955, and rehearing was denied on June 9, 1955. Petition for writ of certiorari was filed September 2, 1955. The jurisdiction of this Court is invoked under Section 1254 (1) Title 28 U.S.C.A.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in its judgment which refused to allow petitioner to recover for loss to property not described in or covered by the policy of fire insurance.

NATURE OF THE CASE.

The plaintiff originally brought its action in the Superior Court of Cook County, Illinois, against the Hartford Fire Insurance Company to recover under a policy of fire insurance for an alleged loss by fire to certain farm property consisting of a frame building used as a barn (R. 3, 7).

The case was removed to the United States District Court for the Northern District of Illinois, Eastern Division, and thereafter plaintiff amended its complaint to include The Travelers Fire Insurance Company and Arthur J. Feicht, d/b/a Arthur J. Feicht & Company, an insurance agent and broker, as additional defendants (R. 4, 17).

The additional parties were brought into the case on the theory that if the Hartford policy did not cover the damaged property then one or more of the defendants was guilty of negligence for not having procured from the Hartford a policy covering the property which burned (R. 39).

Defendant Feicht was later dismissed from the suit (R. 4, 55), and upon the trial the jury rendered a verdict in favor of defendant Travelers Fire Insurance Company and a verdict against the defendant Hartford Fire Insurance Company in the amount of $10,750.00 with interest from February 1, 1948 (R. 4, 480).

Defendant, Hartford Fire Insurance Company, appealed from the judgment against it because of the denial by the

trial court of its motions for directed verdicts at the close of the plaintiff's evidence and at the close of all the evidence, and its motions for judgment notwithstanding the verdict and in the alternative for a new trial. The plaintiff appealed from the judgment in favor of the Travelers and filed a cross appeal because of the denial of its motion for attorneys fees against Hartford. The Court of Appeals for the Seventh Circuit without dissent reversed the judgment against the Hartford Fire Insurance Company and affirmed the judgment in favor of the Travelers Fire Insurance Company, and plaintiff's petition for rehearing was denied.

STATEMENT OF THE CASE.

Respondent deems petitioner's statement of the case wholly inadequate.

The plaintiff, Howard Foundry Company, an Illinois corporation, was the owner of several farms and other tracts of land in McHenry County, Illinois (R. 138). The two farms involved in this action were both in McHenry County, Illinois, and were commonly referred to as the Schaefer or Bohr farm and the Justen farm.

The deeds from the former owners of these two properties include, in both instances, some parcels situated in Section 15 and some situated in Section 22, Township 45 North, Range 8, McHenry County (Pl. Ex. 23, R. 343, 469; Pl. Ex. 24, R. 374, 471). Most of the Schaefer, or Bohr, properties were in Section 22, and most of the Justen properties were in Section 15 (Def. Ex. 3, R. 274, 476).

All the buildings on the Schaefer farm were located in Section 22 (R. 363, 364; Def. Ex. 5, R. 361). All the buildings on the Justen farm were located in Section 15 (R.

365, 366, Def. Ex. 5). Both the Hartford policy and the application therefor described the property insured as situated on and confined to Section 15 (Pl. Ex. 6, R. 88, 463; Def. Ex. 1-I, R. 392, 473).

The Schaefer farm was reached by going north on Route 31 in McHenry County then traveling west on the black top road across the tracks of the Chicago & Northwestern Railroad, and all the buildings on the Schaefer farm were west of the tracks at a distance of about three-quarters of a mile west of the intersection of the railroad tracks and the black top road (R. 365, Def. Ex. 5). These buildings are about three hundred feet south of the section line dividing Sections 15 and 22 (R. 363, Def. Ex. 5).

The Justen farm was reached by traveling north on Route 31 and turning west on the black top road and then, before crossing the tracks, going north on a road parallel to the tracks and on the east side of the railroad tracks, or, by continuing on Route 31 past the black top road to a gravel road running west off of Route 31 (R. 366, 367). The buildings on the Justen farm are all east of the Chicago & Northwestern Railroad tracks and about one quarter of a mile north of the section line between Sections 15 and 22 (R. 366, Def. Ex. 5).

The barn on the Schaefer farm was damaged by fire in August, 1947 (R. 227). The buildings on the Justen farm were never involved in a fire (R. 399).

In December of 1945 the property on the Schaefer farm was insured against loss by fire and other perils by a policy in the Travelers Fire Insurance Company in the name of Frank C. Howard and Edward L. Fleury with a Loss Payable Clause to Mrs. Bohr (Pl. Ex. 1, R. 60, 449, 450). This insurance covered certain buildings situated on and confined to Sections 15 and 22 near McHenry, Illinois.

The Plaintiff also had a policy on the buildings on the Schaefer farm issued by the Fidelity Phenix Fire Insurance Company on September 11, 1945, which described the property as located in Sections 15 and 22 (R. 176, 177). That company purchased the amount of $4,980.00 of reinsurance on this policy from Hartford (R. 180) and various amounts from other companies (R. 198). After the fire on the Schaefer farm the Fidelity Phenix Fire Insurance Company paid the plaintiff $17,660.00 for damage to the barn, and the Hartford paid its share of this loss, under its contract of reinsurance, to the Fidelity Phenix Fire Insurance Company in the amount of $3,580.67 (R. 199).

In the early part of December, 1945, Frank Howard, president of the Howard Foundry Company, told A. J. Feicht that he wanted an additional $15,000.00 insurance on the barn covered by the Travelers policy (R. 72). Mr. Feicht is an insurance broker and also an agent of the Travelers Fire Insurance Company (R. 57). He had been tending to insurance business for Mr. Howard for about twelve years prior to the fire (R. 97). He had never been an agent of the Hartford Fire Insurance Company (R. 97). Mr. Feicht contacted George Wagner, an employee of the Travelers Fire Insurance Company, concerning the increase, and Wagner told Mr. Feicht they could not write any more on the farm and would have to cancel the policy (R. 255). He said he would give it to Mr. H. B. Allen of the Hartford Fire Insurance Company (R. 255), and the Travelers policy was cancelled as of December 17, 1945 (R. 62).

Mr. Wagner called Mr. Allen at the Hartford and Allen orally bound certain coverage, including $15,000 on the barn in the name of Frank C. Howard and Edward L. Fleury, Loss Payable Clause to Mrs. Bohr, and located in Sections 15 and 22 (R. 202, 468). Mr. Allen made a writ-

ten memo for his own use (Pl. Ex. 19, R. 203, 468). This was a temporary binder (R. 209), and was only effective pending inspection of the risk by a representative of the company to determine whether the company desired to write a policy covering this property (R. 204, 205).

On January 19, 1946, Glenn Russell, special agent of the Hartford Fire Insurance Company, inspected the buildings on the Schaefer farm in Section 22 (R. 273, 279). This was the same farm upon which the barn later burned since he went back to it after the fire and identified it as the farm which he visited the first time and which he refused to recommend for insurance (R. 276). Three days later Mr. Russell with Mr. F. W. Linahan, supervising special agent of the Hartford, again took Route 31 in a northerly direction, turned west on the blacktop road, crossed the Chicago & Northwestern Railroad tracks while going west and thus arrived at the Schaefer farm where Mr. Russell and Mr. Linahan both inspected the various buildings (R. 282, 381). Both Russell and Linahan decided that the buildings on the Schaefer farm were not a good risk and should not be insured (R. 381, 382), and Russell recommended to the company that it not write the risk in question (R. 285, 406).

Mr. Allen thereupon called Wagner at the Travelers Fire Insurance Company and stated that the Hartford could not write this business, and Mr. Wagner requested that he communicate this to Mr. Feicht (R. 406, 407). Mr. Russell was then advised by Mr. Allen that he had inspected the wrong farm and that he should go to see Mr. Feicht about this (R. 286).

Russell testified that he went to the office of the Travelers Fire Insurance Company and there Wagner introduced him to Feicht (R. 287) who told him to go to a different farm and make an inspection there for the purpose of

determining the eligibility of the buildings on that farm for coverage by the Hartford (R. 292). He further stated he told Mr. Feicht that the farm he inspected was the one you reach after you cross the railroad tracks. Mr. Feicht told him he had inspected the wrong farm, and that he should have followed this same course but when he got to the railroad tracks not to cross them but before crossing the track to take another road that led into the fields (R. 295, 324).

Mr. Russell then made another trip in which he attempted to go north on the road which runs east of the railroad tracks but he could not drive up this road because it was too soft (R. 295). He, therefore, went to the Schaefer farm again where he received instructions to the effect that he could reach the other farm another way. This was to proceed north on highway 31 until he came to a gravel road running to the left (R. 295, 296). Following these directions he arrived at the Justen farm (R. 295, 297), and this is the same farm which is reached by the road running parallel to the railroad tracks and on the east side thereof which is now a gravel road (R. 366).

Feicht admitted that he had been contacted by someone from the Hartford who told him about the farm which he had inspected, and that he, Mr. Feicht, told this person he had gone to the wrong farm and he gave him directions as to the farm that they wanted to have insured (R. 443, 444). He contended, however, that this party said something about not having gone over the railroad tracks, and that he gave him directions to cross the railroad tracks and go on for about half a mile or a mile (R. 444).

Russell measured and inspected the buildings on the Justen farm and made a work sheet showing the amount of insurance he would recommend on each building and the description and measurements of the buildings (R. 299, 300,

Def. Ex. 4, R. 393, 477, 478). He then prepared an application (R. 301) and submitted it to a lady in the office Mr. Feicht occupied at the Travelers Fire Insurance Company (R. 303). She called on the telephone and asked for Mr. Feicht and told him about the application, the amounts of insurance on the various items and the amount of the premium. After having this telephone conversation she signed the application, "Howard Foundry Company by Arthur J. Feicht, Agent" (R. 304, Def. Ex. 1-I, R. 473, 474). Mr. Feicht denied engaging in this telephone conversation, but he did admit that the signature appeared to be in the handwriting of his secretary (R. 104-106). Russell then attached his work sheet to the application, wrote "inspected" on the back of the application and signed his name which meant that he recommended the risk (R. 305). The policy of the Hartford Fire Insurance Company in question (Pl. Ex. 6, R. 461-467) was then written from this application (R. 306) to cover certain property situated on and confined to 166 acres in Section 15, Township 45, Range 8, County of McHenry, State of Illinois.

This policy was sent by the Hartford to Mr. Feicht who read it and sent it on to Wesley Mundil, Controller of the Howard Foundry Company, in March of 1946 (R. 118, 245). Mr. Mundil read the policy, was satisfied with it, and it remained in the plaintiff's possession without objection until the fire occurred in August of 1947 (R. 245).

After the fire on the Schaefer farm Allen, Linahan and Russell made a trip to both farms and checked the buildings on each farm against the contents of the application and the work sheet (R. 320, 321, 397, 398). Both Allen and Russell testified that the descriptions of the buildings and the measurements of the buildings in these documents coincided perfectly with the buildings on the Justen farm but did not compare at all with those on the Schaefer farm (R. 322, 397, 398).

Also, another employee of the Hartford Fire Insurance Company, Mr. H. G. Bannerman, who later became Superintendent of its Farm Department, made an inspection trip to the two farms after the fire (R. 417). He checked the buildings with the application and later on he also compared them with the policy (R. 418, 419). He also testified that the buildings on the Schaefer farm did not fit the descriptions in those documents, and that the buildings of the Justen farm did fit the description (R. 418, 420).

As a result of these detailed examinations the following physical facts were shown:

1. The roofs on the various buildings on the Justen farm were composition or "approved" roofs which are semi-fireproof (R. 317, 399, 423), while the roofs of all the buildings on the Schaefer farm, including the roof of the barn which burned, were constructed of shingles made of wood (R. 317, 418). The Hartford policy shows that the buildings insured as dwelling house, barn, and sheds had approved roofs (R. 463). An approved roof cannot be made of wooden shingles (R. 317).
2. The insured barn was described in the application as 140 feet long by 40 feet wide (R. 478) which are the dimensions of the Justen barn. The barn which burned on the Schaefer farm was 100 feet long by 60 feet wide (R. 338, 344).
3. The silos on the Justen farm consisted of one on the east side of the barn and one on the west side of the barn as shown in the diagram in the application (R. 424, 474), while the silos on the Schaefer farm were both on the west side of the barn (R. 321, 369, 423).
4. The dwelling house which was insured was a two- and one-half story building and this was the size of the dwelling house on the Justen farm (R. 368, 399,

422). The dwelling house on the Schaefer farm was a one-and-one-half story building (R. 321, 418, 423).

5. The Schaefer farm had no chicken house or hog house, both of which are described in the policy (R. 398, 419, 425).
6. There were two buildings on the Schaefer farm, a garage and a bull barn, which are not described in the policy at all (R. 418).

The three witnesses, Allen, Russell and Bannerman, stated that from their personal examinations it was clear that the descriptions and measurements of the buildings as set forth in the policy, the application and the work sheet coincided perfectly with the buildings on the Justen farm but were not in any way similar to the buildings on the Schaefer farm (R. 322, 397-399, 418, 420).

ARGUMENT.

I.

THE JUDGMENT OF THE COURT OF APPEALS APPLIED AND FOLLOWED APPLICABLE STATE AND FEDERAL LAW.

(a) Where a policy of insurance is clear and unambiguous a recovery cannot be had for loss to property not described in the policy.

The Court of Appeals stated in its opinion that there was no ambiguity in this policy, and that the clear recital of acreage and section number in the policy could not be ignored. All the buildings on the Justen farm were in Section 15, which was the Section described in the policy, and all the buildings on the farm where the loss occurred, including the barn which burned, were in Section 22, which Section was nowhere included in the policy. The acreage of the Justen farm in Section 15 was 166, as described in the policy. Hartford's Exhibit 3 (R. 476), the page of the plat book, shows beneath the Justen name in Section 15 the acreage of 166 and a fraction. The policy described the roofs of the insured buildings as "approved", which was correct as to the Justen buildings, and none of the Schaefer buildings had approved roofs. Furthermore, the various descriptions of the buildings in the policy, application and work sheet were exact descriptions of the Justen buildings and could not possibly apply to any buildings on the Schaefer farm.

It is agreed that the law of the State of Illinois controls on the question of the coverage of the policy. The petitioner brought suit to recover under the policy, and recovery was rightfully denied to it under the authority of the case of *Niedringhaus* v. *Aetna Insurance Co.*, 235 Ill. App. 335, which is the law of Illinois as the Court of Ap-

peals recognized. In that case the facts were almost identical with those in the instant case, and the Illinois Court held that the jury could not find for the plaintiff for fire loss to a building located in a section, which section was not described in the policy. On page 337 the Court stated as follows:

> "In the absence of ambiguity in the terms of a policy parol evidence is not admissible for the purpose of extending the policy to cover property not included in the description."

Under such a set of facts other jurisdictions have made the same decision. See *Collins* v. *St. Paul Fire & Marine Insurance Co.*, 44 Minn. 440, 46 N.W. 906, and *Landers* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212.

(b) Petitioner was not entitled to recover on a theory of mistake under Illinois law.

Petitioner sued on the policy and contended that it covered the building which burned by its terms. Petitioner did not advance to the trial court or to the jury any theory of equitable relief for fraud or mistake. The jury was not instructed on petitioner's behalf as to a theory of fraud or mistake as petitioner intimates. The only instruction which even mentioned fraud or mistake was an instruction tendered by respondent, Hartford, relating to the jury's duty to find for the defendant if the plaintiff failed to read its policy as was its duty—this instruction being given under the theory of the case of *Pollock* v. *Connecticut Fire Insurance Company*, 281 Ill. App. 305, 362 Ill. 313.

Apparently, petitioner is here concerned with a theory of estoppel on the assumption that respondent inserted an erroneous description by mistake. This is essentially another way of attempting to recover under the theory of reformation for mutual mistake, which will be dealt with in the next succeeding sub-paragraph of this brief.

Suffice it to say here that petitioner's cases in Section I (a) of the petition have no application to the case at bar. The cases of *Royal Neighbors of America* v. *Boman*, 177 Ill. 27, and *Moone* v. *Commercial Casualty and Insurance Company*, 350 Ill. App. 328, (cited as "*Mooney* v. *Commercial Casualty and Insurance Company*" in petitioner's brief), are life and disability insurance cases where the insurance companies' agents were told the truth but inserted false answers in the applications. The cases of *Anderson* v. *Pettigrew Foundry Company*, 297 Ill. App. 14, and *Buchanan* v. *Scottish Union and National Insurance Co.*, 210 Ill. App. 523, are ones where both parties agreed as to the property intended to be covered by the contract, but the property was incorrectly described in the document. These cases do not apply to a situation as here where two different sets of buildings are involved with different legal and physical descriptions, one set of buildings being described in the policy, but the parties disagreeing as to which was insured.

We utterly fail to comprehend how petitioner can contend that the case of *Pollack* v. *Connecticut Fire Insurance Company*, 281 Ill. App. 305, affirmed 362 Ill. 313 (cited by the Court of Appeals in its decision on other grounds) sustains its position here. That case involved the sole and unconditional ownership provision of a policy. There was no question there of fraud or mistake, as the insurance company had no knowledge as to the actual condition of the title, and the Court did not discuss these questions. The Court held for the defendant insurance company, deciding that the clause was valid, that the Company had not waived it in anyway, and that the plaintiff had accepted the policy and was bound by its terms.

(c) Petitioner cannot recover here under any theory of equitable relief.

The petitioner brought its action at law to recover under the policy, and no theory of equitable rights was presented in the pleadings. No such theory was presented to the trial judge, who made no independent decision, and the final decision was made by the jury which was not an advisory jury, and it was not instructed on any equity theory. And yet, the Howard Foundry Company now contends that the jury's verdict should control since it claims the jury may have found for petitioner on the basis of a reformation of the instrument.

The cases as cited by petitioner in Section II (a) of its brief do not sustain its contentions. None of these cases are suits at law where no equitable issues were raised or considered in the trial Court, but equitable relief was afforded later. For instance, the case of *Herzbergs Inc.* v. *Ohio Accident and Guarantee Corp.*, 100 Fed. 2(d) 171; 42 Fed. Supp. 52; 132 Fed. 2(d) 438, cited by petitioner, was a suit at law which the plaintiff won in the District Court, and which was reversed on appeal. The plaintiff then applied to the trial court to be allowed to amend the complaint to ask for reformation. The District Court, 42 Fed. Supp. 52 at 53, held "that an adjudication of a Federal Court is conclusive of all questions, both law and fact, upon which rights of parties depend, or those which might have been determined as well as those which were", and, therefore, the judgment of the Court of Appeals was *res adjudicata* on the question of reformation. This judgment was affirmed on appeal on this question in 132 Fed. 2(d) 438, where it was held that the reformation amendment would constitute a new cause of action which was barred by the statute of limitations, and reformation was denied.

Even if notwithstanding the above circumstances, the Court could, from a procedural standpoint, consider possible equitable considerations, still there was no substantive right here to a reformation—in fact, quite the contrary was the case. That the grounds for reformation of an instrument are either a mutual mistake, or a mistake on one side and fraud on the other, is universal law and hardly needs the citation of authority. This Court concisely stated these grounds in *Simmons Creek Coal Co.* v. *Doran*, 142 U.S. 417, 35 L. Ed. 1063 at 1071 as follows:

> "The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."

Petitioner several times mentions unilateral mistake but does not claim fraud or show any inequitable conduct on the part of the representatives of respondent. Without such a showing a unilateral mistake is never grounds for reformation. The Hartford's representatives followed the instructions of Mr. Feicht, who was procuring insurance for the Howard Foundry Company, and when they decided not to write insurance on the Schaefer buildings, this was communicated to Mr. Wagner and Mr. Feicht. The Hartford then followed Mr. Feicht's instructions as to insuring the buildings on the other farm. Clearly no wrongful conduct could be shown as far as the respondent is concerned.

In the absence of fraud the law is well settled that a mistake must be common to both parties and must be proven to a certainty and beyond any reasonable doubt to have been a mutual mistake before a court will grant reformation. There is a strong presumption that the writing expresses the intention of the parties, and there must be clear

and convincing proof that a contract has been entered into which expresses what *neither* party intended.

These essential requirements for relief by way of reformation are set forth by this Court in *Hearne* v. *New England Mutual Marine Insurance Co.*, 20 Wallace 490, 22 L. Ed., 395 at 396 and 397:

> "The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points . . . The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. . . . A mistake on one side may be a ground for rescinding, but not for reforming, a contract. . . . Where the minds of the parties have not met there is no contract, and hence none to be rectified." (Citations omitted).

The retention of the policy by the petitioner is also important in this connection. In *Graves and Barnewall* v. *Boston Marine Insurance Co.*, 2 Cranch 419, 2 L. Ed., 324 at 332, this Court said:

> "The policy was in the possession of the agent for the plaintiffs, and ought to have been understood by him before it was executed; he retained it in his possession for several months before a mistake was alleged. Under such circumstances, the information given to the insurance company ought to be very clear to justify a court of equity in conforming the policy to the intention of one of the parties, which was not communicated to the other till the loss had happened."

And again in the case of *Snell* v. *Atlantic Fire and Marine Ins. Co.*, 98 U.S. 85, 25 L. Ed. 52 at 54, this Court stated:

> "Of course, parol proof in all such cases, is to be received with great caution and, where the mistake is denied, should never be made the foundation of a de-

cree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake."

The courts of Illinois have consistently followed the general principles of reformation for mutual mistake. In *Christ* v. *Rake,* 122 N.E. 854 at 855; 287 Ill. 619 at 622, the Supreme Court of Illinois said:

"Where contracting parties have reduced their agreement to writing it is presumed to express their mutual intention, and that presumption does not yield to any claim of a different intention unless the evidence of a mutual mistake is of a strong and convincing character. A written instrument will not be reformed on the ground of mistake unless the evidence that it does not express the intention of the parties is such as will strike all minds alike as being unquestionable and free from reasonable doubt. The remedy of reformation on account of an alleged mistake is never granted upon a probability nor upon a mere preponderance of the evidence but only upon evidence amounting to a certainty."

In *Silurian Oil Co.* v. *Neal,* 115 N.E. 114 at 115; 277 Ill. 45 at 48, the Court stated as follows:

"There is, however, a strong presumption that when parties reduce their agreement to writing it expresses their intention, and to overcome the presumption that the writing is their agreement the evidence must be clear and convincing, and the court will never grant relief except upon the most satisfactory evidence and because of its evident justice and necessity. (*Mills* v. *Lockwood,* 42 Ill. 111.) Three things are necessary to justify the reformation of a written instrument upon the ground of a mistake: First, that the mistake be one of fact and not of law; second, that the mistake

> be proved by convincing and clear evidence; and third, that the mistake was mutual and common to both parties to the instrument. (*Purvines* v. *Harrison*, 151 Ill. 219.) A reformation can only be had upon a clear proof that the alleged mistake was mutual, and the proof must be such as to leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intention of the parties but was executed under a common mistake and expresses what neither of the parties intended. *Sutherland* v. *Sutherland*, 69 Ill. 481; *Seeley* v. *Baldwin*, 185 *id.* 211."

See also *Pearce* v. *Osterman*, 175 N.E. 416 at 416; 343 Ill. 175 at 176, and *Skelly* v. *Ersch*, 137 N.E. 106 at 107; 305 Ill. 126 at 130.

In view of the actions and requests of Mr. Feicht, who negotiated with respondent on behalf of petitioner, it may be seriously questioned whether petitioner intended to insure the Schaefer buildings rather than the Justen buildings at the time the policy was written. In any event, it was clear that there was no mutual mistake involved here. Hartford not only did not intend to insure the Schaefer buildings in the policy, but it even refused to insure them after inspecting them. The evidence was overwhelming that the legal descriptions, physical descriptions, drawings and notations in the Hartford's policy, the application and the work sheet clearly and unmistakably identified the buildings on the Justen farm as the subject of insurance, and could not possibly constitute descriptions of the buildings on the Schaefer farm. Could it thus be contended that there was any evidence, much less evidence clear and convincing and beyond a reasonable doubt, that the contract expressed what neither party intended when Hartford, according to the documents and the testimony of the witnesses, obviously intended to insure the Justen buildings which were accurately described? There was, under such

circumstances, no possible meeting of the minds as to insurance on the Schaefer buildings, no mistake common to both parties, and no grounds for reforming the policy.

The Court of Appeals properly reached this conclusion and stated in its opinion:

> "On the state of this record we think it unnecessary to narrate evidence presented below purporting to demonstrate intention of the contracting parties, or of a unilateral or mutual mistake."

(d) The Court correctly applied the law of Illinois as announced in Pollock v. Connecticut Fire Insurance Company, 281 Ill. App. 305; 362 Ill. 313.

Where two representatives of petitioner, including the person who ordered the insurance, examined the policy, and it was retained by petitioner for a long period of time as here, it is the law of Illinois, as set forth in the *Pollock* case, the case of *Capps* v. *National Union Fire Insurance Company,* 149 N.E. 247, 318 Ill. 350, and others, that the insured is conclusively presumed to know the contents of the policy and is bound thereby. The Howard Foundry Company admits that this is true, but says that it does not apply if the insurer misled the petitioner; yet petitioner does not state one act of any representative of the Hartford which was calculated to mislead petitioner. Everything the Hartford did was at the behest of the only representative of petitioner who ever contacted the Hartford.

The statements in the *Pollock* case, on pages 310 and 311 of 281 Ill. App. fit the situation in the present case perfectly:

> "It appears to us that when the plaintiff appellant received the policy from the defendant appellee containing the sole and unconditional ownership clause and when he accepted this policy he thereby became charged with the knowledge of the terms and condi-

tions contained therein; and we fail to see how it can be successfully contended that any duty rested upon the defendant appellee to notify the plaintiff appellant of the contents of the policy, for, as said in the case of *Capps* v. *National Union Fire Ins. Co.*, 318 Ill. 350, 'Unless he has been misled by some act of the insurer, it is generally held that a person who accepts and retains the possession of an insurance policy is bound to know its contents.' (Citing *Crikelair* v. *Citizens' Ins. Co.*, 168 Ill. 309.) This being the rule, if there was anything wrong with the policy which would give rise to a defense because the terms of the contract had not been complied with such as not correctly setting out the interest of the plaintiff appellant in the premises insured, it became the plaintiff appellant's duty to return the policy for correction. There is no evidence in this case that the insurer by any act of its agents or otherwise made any representations or promises or used any artifices or deceit to induce the plaintiff appellant to enter into the insurance contract, and we cannot see how it can be successfully argued that the insured was misled by any act of the insurer."

That this is also the law under the decisions of this Court and the other Federal Courts, see the following cases: *Lumber Underwriters of New York* v. *Rife*, 237 U.S. 605, 59 L. Ed. 1140 at 1143; *United States Casualty Co.* v. *Charleston Mining & Mfg. Co.*, 183 Fed. 238 at 242 and 243; *Norwich Union Indemnity Co.* v. *Kobacker & Sons Co.*, 31 Fed. 2(d) 411 at 412.

It will be noted that these cases hold that the rule applies even where the insured never read the policy after accepting it.

II.
THE ORIGINAL BINDER WAS NOT IN EFFECT AT THE TIME OF THE FIRE.

Hartford's underwriter originally orally agreed to bind insurance on the Schaefer buildings, and there was no formal written binder issued, but there was merely a memorandum made by the underwriter for his own use. The temporary oral binder was subject to inspection of the property, and after this inspection the Hartford refused to write the risk and communicated this decision to Mr. Wagner, who had originally called the Hartford, and also to Mr. Feicht, who was negotiating for insurance for the Howard Foundry Company. This eliminated the oral binder in accordance with the terms of its issuance.

Furthermore, Mr. Feicht then changed the request to other property for which insurance was then written. Feicht is the only person connected with the Howard Foundry Company who was shown to have known of the binder and he accepted the policy as covering the only property to be insured for the petitioner in accordance with his requests as did the petitioner. The binder would thus be eliminated by the writing of the policy, as well as by the prior rejection. The petitioner cannot accept a policy as being the insurance it desires and then when the property burns, which is not covered by the policy, claim that the binder written at the beginning of the negotiations for insurance is also still in effect even though the company had refused to write a policy on the property originally bound and the petitioner had paid no premium except for the policy which it accepted. If this were not so petitioner would have two insurance policies on different property, but would pay for only one.

The Court of Appeals stated in its opinion that it had fully considered the petitioner's contentions bottomed on the binder, and the decision of the Court rejecting this contention was clearly correct.

III.

NO ISSUE EXISTED IN THIS CASE FOR DETERMINATION BY A JURY AND JUDGMENT N.O.V. WAS PROPER.

The petitioner sued at law to recover on the policy as written. It received a jury trial, and the Court of Appeals correctly held that the policy was clear and unambiguous and that the jury could not change the policy to cover property of a different description. The entry of judgment n.o.v. does not, of course, deny a party trial by jury. See *Delaware L. & W. Railroad* v. *Converse,* 139 U.S. 469, 35 L. Ed. 213 at 215, and *Galloway* v. *United States,* 319 U. S. 372, 87 L. Ed. 1458 at 1470.

This was not a case involving both legal and equitable issues as was the case of *City of Morgantown, W. Va.* v. *Royal Ins. Co. Ltd.,* 337 U.S. 254, 93 L. Ed. 1347, and other cases cited by petitioner. The Howard Foundry Company never advanced a claim for equitable relief at the trial, nor was such considered by the Court or presented to the jury. This was not an advisory jury, and the trial court did not make any independent finding. Petitioner would not be entitled to a jury trial in connection with the question of reformation. This was well stated in the case of *Bellavance* v. *Plastic-Craft Novelty Co.,* 30 Fed. Supp. 37 at 39, where the Court said:

> "To avoid constitutional complications, Rule 38 preserved those rights to a jury trial as declared by the Seventh Amendment, or as given by a statute of the United States. Inasmuch as this amendment applies only to suits at common law, a distinction will always need to be drawn between suits at law and suits in equity in order to determine whether one has a right, under the Constitution, to have the issues of the case determined by a jury.
>
> "The distinction between Law and Equity, abolished by the new rules, is a distinction in procedure and not a distinction between remedies. The distinc-

tion still remains between jury actions and non-jury actions; what was, before the adoption of the new rules, an action at law is a jury action, and what was a suit in equity falls into the category of a non-jury action. See Moore's Federal Practice, Vol. 1, page 107, and Vol. 3, page 3004 *et seq.*; Trial by Jury and the New Rules of Procedure, by James, 45 Yale Law Journal, 1022 *et seq.*"

The case of *Leimer* v. *Woods*, 196 Fed. 2(d) 828, cited by petitioner, merely upheld the uncontroverted rule that a party has a right to jury trial on legal issues. In that same case the Court, on page 832, said that there is no right to jury trial when the Court exercises equity jurisdiction.

Furthermore, as we have shown previously in this brief, there was no evidence here which would entitle the Howard Foundry Company to recover on any equitable theory if one had been presented.

IV.

THE POLICY WAS NOT SUBJECT TO CONSTRUCTION, AND THE ENFORCEMENT OF THE POLICY AS WRITTEN WAS REQUIRED IN ORDER THAT THERE NOT BE A DEPARTURE FROM THE ACCEPTED AND USUAL JUDICIAL PROCEDURE.

The general principle that an insurance policy, when ambiguous, will be construed in favor of the insured cannot aid the petitioner here. The descriptions in the policy were clear and precise, and could apply to only one group of buildings—those on the Justen farm. There was nothing in the policy requiring construction, and in such cases the courts of the nation invariably enforce the contract as written. This is true in both the Federal Courts and the courts of Illinois.

The Supreme Court of Illinois, in the case of *Blume* v. *Pittsburgh Life & Trust Company,* 104 N.E. 1031, 263 Ill. 160 at 164 said:

> "The relation of an insurance company to its policyholders is purely contractual. There is ordinarily no element of trust relation involved. The parties being competent to contract, had a legal right to insert such provisions in the agreement as they saw proper, and it is the duty of courts to construe and enforce agreements as made and not to make new contracts for parties."

See also the case of *Souchie* v. *Illinois Agricultural Mutual Assurance Company,* 56 N.E. 2(d) 55, 323 Ill. App. 456 at 462 and 463.

The Court of Appeals for the Seventh Circuit, prior to the disposition of the case at bar, enunciated this rule in the case of *Hill* v. *Standard Mutual Casualty Company,* 110 Fed. 2 (d) 1001 at 1003:

> "When, however, there is no ambiguity in the terms, neither party is to be favored, *Norwaysz* v. *Thuringia Ins. Co.,* 204 Ill. 334, 68 N.E. 551, and if the contract is one that the parties could lawfully make, it is the duty of the court to enforce it as the parties made it."

The case of *Snell* v. *Atlantic Fire and Marine Insurance Company,* 98 U.S. 85, 25 L. Ed. 52, cited by petitioner, has no applicability here. In that case there was a mutual mistake involved, and the insured never had possession of the policy and had never even seen it.

The petitioner is, in effect, contending that where an insured's policy does not cover his loss, all he has to do is claim he intended otherwise, and regardless of ambiguity, it becomes a question of construction which must be decided in the insured's favor. The general principle was never intended to be perverted for such a purpose.

CONCLUSION.

The case at bar presents no question of public importance or significance, nor is there a conflict with established law. The contract between the parties was correctly enforced as written by the decision of the Court of Appeals for the Seventh Circuit. If the simple provisions of such a contract could be negated and overturned by no more show of reason than is presented here, contractual terms would become meaningless, litigation would be unceasing, and certainty in contracts of insurance or contracts of any kind would be a nullity.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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